Filed 4/10/19 P. v. Dixon CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY DIXON et al., Defendants and Appellants.	B277759 (Los Angeles County Super. Ct. No. TA136291)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael J. Shultz, Judge. Reversed and remanded with directions.

Janyce Keiko Imata Blair, under appointment by the Court of Appeal, for Defendant and Appellant Anthony Dixon.

Jeralyn Keller, under appointment by the Court of Appeal, for Defendant and Appellant Kevone Earl.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Shawn McGahey Webb, Yun K. Lee and Lindsay Boyd, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Anthony Dixon and Kevone Earl appeal their convictions on one count of second degree murder, three counts of attempted murder, and in Earl's case, one count of shooting at an inhabited dwelling. Dixon and Earl contend (1) the trial court erroneously denied two motions under *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*) and *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*) (*Batson*/*Wheeler* motion), (2) substantial evidence did not support two of the convictions for attempted murder, (3) trial counsel for both defendants provided ineffective assistance by failing to object to the admission of evidence concerning the injury of one of the attempted murder victims, and (4) the trial court erred in excluding evidence tending to show a third party committed the crimes. Earl separately argues the trial court made several errors in his sentence.

We conclude that the trial court erred in denying one of Dixon and Earl's *Batson*/*Wheeler* motions and that substantial evidence supported the two challenged attempted murder convictions. Therefore, we reverse the judgment and remand for a new trial and do not reach the other issues Dixon and Earl raise.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Shooting*

The South Side Compton Crips is a criminal street gang in Compton. The gang's main rival was the Santana Blocc Crips. On the evening of May 19, 2014 Dixon, a self-described "general"

of a South Side Compton Crips clique, drove Keyshawn Evans,[1] a fellow gang member, and Earl, an associate of the gang, in an SUV to a "well-known Santana Blocc house" on Spring Avenue, where Terrence Sims, a member of the Santana Blocc Crips, and his family resided.

Sims had just left on his bicycle to go to a store. Cordell Ricks, a member of the Santana Blocc Crips, was sitting in the front passenger seat of a car parked in a carport by the house, and Joseph Daniels was standing on the porch.

Dixon stopped the SUV in front of the house. Evans and Earl got out of the car and fired approximately 20 shots at the house and the property. Several members of Sims's family were home, including his older sister, Candice Barcenas. One of the bullets hit and killed Barcenas while she was inside the house. Another bullet hit Daniels, who sustained a gunshot wound to his ankle. Ricks was not injured.

As Sims rode his bicycle down Spring Avenue, he heard gunshots coming from the front of the house. When he looked back, he saw a dark blue SUV. Sims got off his bicycle and ran to the side of a nearby mortuary. Sims saw the SUV drive past the mortuary and heard four or five more gunshots. Sims believed he was "being shot at," but he was not hit. A surveillance video of the mortuary on the night of the shooting showed a "bright light" emitting from "the center dash area" of the SUV.

---

[1] The People charged Evans as a codefendant in this case but tried the charges against him to a separate jury.

B. *The Investigation*

Detectives recovered 20 expended cartridge cases from the scene. Detectives observed bullet damage to the cars parked on the front lawn and the driveway of the house. Detectives also found bullet holes in the windows, the interior walls of the house, the kitchen cabinets, and the screen door.

Detectives subsequently learned that on May 5, 2014, two weeks before the shooting at Sims's house, there was a shooting that resulted in the deaths of Omar Williams and Jesus Pena, two members of the South Side Compton Crips. Detectives also learned that on May 19, 2014, a few hours before the shooting on Spring Avenue, Dixon attended Williams's funeral.

Through a series of wiretaps on the cell phones of various members of the South Side Compton Crips, detectives obtained evidence inculpating Dixon, Earl, and Evans in the May 19, 2014 shooting. For example, in one call Earl discussed with a fellow gang member Earl's knowledge of and involvement in the shooting. In another call, Dixon said to a fellow gang member, "Squad got out here got on their shit," which detectives interpreted to mean Dixon's squad members had retaliated against members of their rival gang for the deaths of Williams and Pena. Dixon also stated, "It's gonna be the 4th of July until I go back home," which detectives interpreted to mean the retaliation involved "causing effects similar to that of fireworks, . . . shooting the enemy until he goes back home."

The police eventually arrested Dixon driving a blue SUV with a monitor affixed to the radio of the car. In a recorded jail conversation, Dixon told Evans, "I took the T.V. off when we left the street, you remember? I took it off," and Evans responded, "That shit was bright as a bitch fool, you can see it."

C. *The Charges*

The People charged Dixon and Earl with the murder of Barcenas and the attempted murders of Ricks, Daniels, and Sims, and Evans with shooting at an inhabited dwelling. The People alleged Dixon and Earl committed the crimes for the benefit of, at the direction of, or in association with a criminal street gang, within the meaning of Penal Code section 186.22, subdivision (b).[2] The People alleged Dixon and Earl committed the murder and attempted murders willfully, deliberately, and with premeditation.

The People also alleged as to the murder of Barcenas and the attempted murder of Daniels that Earl personally and intentionally used and discharged a firearm causing great bodily injury or death within the meaning of section 12022.53, subdivisions (b) through (d), and that a principal discharged a firearm within the meaning of section 12022.53, subdivisions (b) through (e)(1). The People alleged as to the attempted murders of Sims and Ricks that Earl personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivisions (b) and (c), and that a principal intentionally used and discharged a firearm within the meaning of section 12022.53, subdivisions (b) through (e)(1).

D. *The Trial, Verdicts, and Sentences*

Ricks testified the car in which he was sitting faced the street, giving him a "dead-on look towards the street." Ricks stated that, after Sims left on his bicycle, he talked to Daniels "for a couple seconds" and then used his cell phone as Daniels

---

2 Statutory references are to the Penal Code.

walked "towards the . . . back of the car." At some point someone told Ricks to look up, and he saw a truck "directly in front of [him]" and a black and white bandana on the face of one of the passengers in the truck. Ricks heard gunshots and ducked. Ricks stated he heard approximately three gunshots before the car stopped at the house and a total of "20 or more" shots while the car was in front of the house. Ricks testified he felt the shooters fired at "the whole property, the family, everything, the house, everything."

Daniels did not testify at trial, but Deputy Sheriff Miguel Garcia, who assisted in the investigation, testified he received a call to attend to "another gunshot victim" at the hospital, who turned out to be Daniels. Deputy Garcia spoke to Daniels and observed he had a gauze and bandage around his ankle and walked with a limp. Daniels gave the officer a bullet fragment. Another officer testified that hospital records reflected Daniels suffered a gunshot wound to his ankle on May 19, 2014 and that doctors had removed a foreign object from under his skin.

A gang expert testified that members of a gang gain status by committing crimes for the benefit of the gang and that, if a rival gang member commits an act of disrespect, the act justifies "taking that individual out." The gang expert testified that a gang expects its members to retaliate in order to preserve the gang's reputation and that gang members value respect and have "ultimate respect" for "someone that's willing to pull the trigger for the gang." If in attempting to avenge the deaths of their fellow gang members the retaliating gang members cannot find their primary target, they will "go after anybody from that particular gang that they feel disrespected them." The gang expert also testified that a house can become known as "a

Santana Blocc house" and that "automatically . . . people in the community will assume that everybody that comes and goes from that house is gonna be a member of that particular gang." Based on a hypothetical mirroring the facts of the case, the gang expert testified the gang members committed the shooting for the benefit of or at the direction of the South Side Compton Crips because the shooting "enhances their reputation for violence."

The jury found Dixon and Earl guilty of second degree murder for the killing of Barcenas and the attempted murders of Sims, Ricks, and Daniels. The jury found Dixon committed the attempted murders willfully, deliberately, and with premeditation, but Earl did not. The jury also found Earl guilty of shooting at an occupied dwelling. The jury found true the allegations Dixon and Earl committed the crimes for the benefit of, at the direction of, or in association with a criminal street gang, within the meaning of section 186.22, subdivision (b). Finally, the jury found Earl personally and intentionally discharged a firearm, within the meaning of section 12022.53, subdivisions (b) through (e)(1).

The trial court sentenced Dixon to life in prison with a minimum parole eligibility of 140 years. The trial court sentenced Earl to life in prison with a minimum parole eligibility of 210 years. Dixon and Earl timely appealed.

DISCUSSION

A. *The Trial Court Erred in Denying One of the Two Batson/Wheeler Motions*

1. *Procedural Background*

a. *The First Batson/Wheeler Motion*

Prospective Juror No. 4 was a retired beverage company employee. On the first day of jury selection, after answering the preliminary questions the court had asked all of the prospective jurors, Prospective Juror No. 4 responded to several questions from the court and counsel for Dixon. Prospective Juror No. 4 stated that his sister was a retired "police officer" in the Sheriff's Department and that his brother "got stabbed to death," an incident that required him to speak to the police and to testify in court. Prospective Juror No. 4 stated that the delay in apprehending the person who had stabbed his brother would not cause him to be unfair in this case. Prospective Juror No. 4 also stated that the grandson of his pastor had been killed in a gang-related shooting and that, although "gang relationships" did not "make sense" to him, he "could be fair."

On the second day of jury selection, the prosecutor questioned the prospective jurors about circumstantial evidence and used an incident Prospective Juror No. 18 had shared about a burglary at her home to explain the concept. The prosecutor stated that, even though Prospective Juror No. 18 did not witness the burglary, she had locked her home when she left and returned to find her room "had been gone through." The prosecutor explained that Prospective Juror No. 18 used "circumstantial evidence" to make a "reasonable inference" that her house had been burglarized and that, "[be]cause clearly we do

that every day, we just don't think about it, that it's circumstantial evidence." After confirming with a few prospective jurors they could use circumstantial evidence to draw a conclusion about what had happened in the case, the following exchange occurred with Prospective Juror No. 4:

"[The prosecutor]: How about you, Prospective Juror No. 4? You've been quiet this morning. Would you also be comfortable making those same logical inferences? Want me to do it again?

"[Prospective Juror No. 4]: Yes.

"[The prosecutor]: So, [Prospective] Juror No. 18 came home. She had locked her house before she left and she came home. Her room, her bedroom, was a mess, and there were items missing. The logical conclusion being, what, that she was burglarized?

"[Prospective Juror No. 4]: Right.

"[The prosecutor]: We could come up with a possible conclusion that she's just a slob and disorganized, but you don't usually call the police over that. That's a possibility, but what's reasonable is, because of all of these steps, the house was locked, the room was a mess, things were missing, the police were called, the conclusion is, she was burglarized. Would you be comfortable making those same types of logical inferences in a courtroom, or are you a I-have-to-see-it-to-believe-it kind of guy?

"[Prospective Juror No. 4]: I had a problem a couple days ago, and I'm sitting here listening. Somebody stole something out of my truck.

"[The prosecutor]: Right. You didn't see it, right?

"[Prospective Juror No. 4]: I didn't see it.

"[The prosecutor]: But you know its missing?

"[Prospective Juror No. 4]: And I'm thinking, did I put it in the truck? And I know I put it in there, and I wonder did I leave

it on the side. That happened the day before I came to court, and that's what I've been thinkin', how did this come up missing.

"[The prosecutor]: And you're making logical, reasonable—and you haven't found it yet, right?

"[Prospective Juror No. 4]: I haven't found it.

"[The prosecutor]: So, could you make those same reasonable inferences in a courtroom, like just hearing based on the evidence that you hear in here?

"[Prospective Juror No. 4]: According to the law, I'd have to.

"[The prosecutor]: Well, is it something you're comfortable doing, though? Some people aren't—some people are like, 'I have to see it to believe it.'

"[Prospective Juror No. 4]: No, I don't have to see it to believe it. I know it's gone."

The prosecutor exercised eight peremptory challenges, four of which were against African American prospective jurors. The attorneys for Dixon and Earl made a joint *Batson*/*Wheeler* motion,[3] arguing the prosecutor had "targeted" "at least four Black jurors." The trial court asked the prosecutor to address whether Dixon and Earl had established a prima facie case of "systematic exclusion," pointing out that half of the prosecutor's eight peremptory challenges had been against African American jurors and the jury box included three African American prospective jurors.

---

[3] Although counsel for Dixon cited only *Wheeler* when making the motion, "on appeal a *Wheeler* motion is treated as a motion under *Wheeler* and *Batson*." (*People v. Chism* (2014) 58 Cal.4th 1266, 1309, fn. 14.)

"[The prosecutor]: I will start with the probation officer who was [Prospective Juror No. 8]. . . . In my experience, probation officers who work at the juvenile camps tend to have unrealistic views of these juveniles [and] they're not necessarily particularly law enforcement friendly. In addition, her demeanor when she came in . . . she sat there with her arms crossed over her chest, looking downward, and the expression on her face was clearly annoyance. . . .

"With respect to . . . [Prospective] Juror No. 12, . . . she talked about her grandson being convicted for a crime that she felt he did not commit. She's very angry and upset. . . .

"With respect to [Prospective] Juror No. 4 who I just kicked, when I was asking him questions on voir dire about circumstantial evidence and would he be able to follow that, he launched into a story about how he had the same experience with his truck being broken into and wasn't clearly answering my question as to if he could make the same logical inferences. He just went off on a tangent. I noticed that he did that as well yesterday. When [the court] would ask questions and when counsel asked questions, he wouldn't give a direct answer.

"And then with respect to [Prospective] Juror No. 9, he felt that the D.A. and the judge suppressed—he wasn't very clear on what that meant, but that his son was convicted of a crime he felt that he did not—was not treated fairly."

The trial court asked the attorneys for both defendants for any "final comments." Counsel for Dixon argued the prosecutor's reason for excusing Prospective Juror No. 8 was "ridiculous" because juvenile probation officers were "some of the most harshest people on gang members." Counsel for Dixon did not challenge the prosecutor's reasons for excusing any of the other

African American jurors, and counsel for Earl did not make any arguments regarding the prosecutor's reasons.

The trial court stated it did not find the prosecutor's reason for excusing Prospective Juror No. 8 "ridiculous" because in the court's experience some juvenile probation officers could be "incredibly rigid" and some "incredibly flexible." The trial court found Prospective Juror No. 9 and Prospective Juror No. 12 "clearly had exhibited some negative feelings towards the judicial system as a whole," which justified the prosecutor's peremptory strikes against them. The trial court did not address the prosecutor's reason for excusing Prospective Juror No. 4. Instead, after stating its findings regarding Prospective Juror Nos. 8, 9, and 12, the court stated, "Based upon all those factors, as well as the current makeup of the jury, the court does not find that a prima facie [case] has been made. To the extent that one has been made, the court accepts the justifications."

b. *The Second Batson/Wheeler Motion*

Another prospective juror sat in seat number 4. The prosecutor exercised a peremptory challenge against that prospective juror, and the prospective juror who had occupied seat number 19 moved into seat number 4, whom we will refer to as the second Prospective Juror No. 4. The prosecutor exercised a peremptory challenge against this prospective juror too. Counsel for Dixon made a second *Batson*/*Wheeler* motion, arguing the second Prospective Juror No. 4, who was a "young African American male," did not say anything that "warranted" the exercise of a peremptory challenge. The prosecutor responded, "Again, I do not believe a prima facie case has been made, and my reason for kicking [the second Prospective Juror No. 4] is because

I noticed him in the audience earlier. He was smacking gum. He was chewing gum. When he was seated up in the box, he was still chew[ing] his gum. When asked questions, he had his arms folded, threw his head back. He clearly did not want to participate. When they come to the courtroom and they don't have enough sense not to chew their gum, that's always a red flag for me. I don't care what the race. It was the entire body language. Again, the way he responded, threw his head, one point was leaning back . . . . He was clearly and visibly annoyed." Counsel for Dixon argued that several prospective jurors folded their arms, which was a "typical posture for jurors," and that he did not have time to look at people in the audience to see if anyone had been chewing gum.

The trial court found the defendants had made a prima facie showing. The court observed that the prosecutor had used five of her 10 peremptory challenges against African Americans and that four out of the 12 prospective jurors in the jury box were African American. The court stated that it did not see the second Prospective Juror No. 4 chewing gum, explaining, "It is something that I think I would have seen, something I look for. I didn't see it." The trial court accepted the prosecutor's justification about the second Prospective Juror No. 4's body language and denied the motion: "I do share [the prosecutor's] belief about his desire to be here, expressed by his body language. He did not appear at all interested in participating as a juror in his case. . . . So, although I find a prima facie case, I do not believe that [the second Prospective Juror No. 4] was struck based upon his race. I believe he was struck based upon the reasons that [the prosecutor] described."

2. *Applicable Law and Standard of Review*

"'The United States and California Constitutions prohibit exercising peremptory challenges based on race.'" (*People v. Hardy* (2018) 5 Cal.5th 56, 75.) "[T]he exercise of even a single peremptory challenge solely on the basis of race or ethnicity offends the guarantee of equal protection of the laws under the Fourteenth Amendment to the federal Constitution [citations] . . . [and] also violates a defendant's right to a trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the state Constitution." (*People v. Gutierrez* (2017) 2 Cal.5th 1150, 1157 (*Gutierrez*).)

"'When a defendant alleges discriminatory use of peremptory challenges, the defendant must first make a prima facie showing of impermissible challenges. If the trial court finds a prima facie case, the prosecutor must then state nondiscriminatory reasons for the challenges. At that point, the trial court must determine whether the reasons are credible and whether the defendant has shown purposeful discrimination under all of the relevant circumstances. The defendant has the ultimate burden of persuasion.'" (*People v. Hardy*, *supra*, 5 Cal.5th at pp. 75-76.) In this case, in ruling on the first *Batson*/*Wheeler* motion, the trial court found Dixon and Earl had not made a prima facie case, but only after the prosecutor stated her reasons for the challenges. "In this situation, 'we infer an "implied prima facie finding" of discrimination and proceed directly to review of the ultimate question of purposeful discrimination.'" (*People v. Hardy*, at p. 76; see *People v. Scott* (2015) 61 Cal.4th 363, 387, fn. 1.)

"At this third step, the credibility of the explanation becomes pertinent. To assess credibility, the court may consider,

"'among other factors, the prosecutor's demeanor; . . . how reasonable, or how improbable, the explanations are; and . . . whether the proffered rationale has some basis in accepted trial strategy.'" [Citations.] . . . Justifications that are 'implausible or fantastic . . . may (and probably will) be found to be pretexts for purposeful discrimination.'" (*Gutierrez*, *supra*, 2 Cal.5th at pp. 1158-1159; see *Synder v. Louisiana* (2008) 552 U.S. 472, 485 ["[t]he prosecution's proffer of this pretextual explanation naturally gives rise to an inference of discriminatory intent"]; *Miller-El v. Dretke* (2005) 545 U.S. 231, 252 ["[i]f the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false"]; *People v. Silva* (2001) 25 Cal.4th 345, 385 ["'[w]here the facts in the record are objectively contrary to the prosecutor's statements, serious questions about the legitimacy of a prosecutor's reasons for exercising peremptory challenges are raised'"].)

"'We review the trial court's determination with restraint, presume the prosecutor has exercised the challenges in a constitutional manner, and defer to the trial court's ability to distinguish genuine reasons from sham excuses.'" (*People v. Hardy*, *supra*, 5 Cal.5th at p. 76; see *People v. Smith* (2018) 4 Cal.5th 1134, 1147 ["'[a]t the third stage of *Batson*, the "critical question . . . is the persuasiveness of the prosecutor's justification for his peremptory strike,"'" and "'we typically defer to the trial court and consider only "whether substantial evidence supports the trial court's conclusions"'"]; *People v. Winbush* (2017) 2 Cal.5th 402, 435 [the trial court's evaluation of the prosecutor's reasons "is entitled to deference and must be upheld if it is supported by substantial evidence"].)

"""Although we generally 'accord great deference to the trial court's ruling that a particular reason is genuine,' we do so only when the trial court has made a sincere and reasoned attempt to evaluate each stated reason as applied to each challenged juror." [Citation.] "When the prosecutor's stated reasons are both inherently plausible and supported by the record, the trial court need not question the prosecutor or make detailed findings. But when the prosecutor's stated reasons are either unsupported by the record, inherently implausible, or both, more is required of the trial court than a global finding that the reasons appear sufficient.""" (*People v. Hardy*, *supra*, 5 Cal.5th at p. 76; see *Gutierrez*, *supra*, 2 Cal. 5th at pp. 1159, 1171 [same]; *People v. Mai* (2013) 57 Cal.4th 986, 1068 ["'[n]otwithstanding the deference we give to a trial court's determinations of credibility and sincerity, *we can only do so when the court has clearly expressed its findings and rulings and the bases therefor*'"].)

"[A] truly 'reasoned attempt' to evaluate the prosecutor's explanations [citation] requires the court to address the challenged jurors individually to determine whether any one of them has been improperly excluded. In that process, the trial court must determine not only that a valid reason existed but also that the reason actually prompted the prosecutor's exercise of the particular peremptory challenge." (*People v. Fuentes* (1991) 54 Cal.3d 707, 720; see *id*. at p. 721 [the trial court failed to "take the . . . necessary step of asking whether the asserted reasons actually applied to the particular jurors whom the prosecutor challenged"]; *People v. Gonzales* (2008) 165 Cal.App.4th 620, 631, 632 ["the prosecutor's statement . . . was implausible in light of its lack of support in the record," and the trial court "did not sufficiently question and evaluate the prosecutor's exercise of his

peremptory challenges"]; *People v. Allen* (2004) 115 Cal.App.4th 542, 553 ["[i]n light of the vague and unsupported reasons offered by the prosecutor, additional inquiry was necessary"]; cf. *People v. Smith*, *supra*, 4 Cal.5th at p. 1157 [the trial court's assessment, which included "questioning counsel closely on certain points," was entitled to deference].)

3. *The Trial Court Erred in Denying the First Batson/Wheeler Motion*

The prosecutor explained she challenged Prospective Juror No. 4 because he could not give a direct answer to her question whether he could make logical inferences based on circumstantial evidence and because he "went off on a tangent" by giving an example from his personal life. Both explanations are unsupported by the record; in fact, Prospective Juror No. 4 did the opposite. He stated he could make logical inferences, and his example of a situation in which he used circumstantial evidence so closely tracked the prosecutor's hypothetical that she used Prospective Juror No. 4's example to further question him.

After the prosecutor described a hypothetical that involved using circumstantial evidence to conclude a burglary occurred, she asked several prospective jurors whether they could make logical inferences from certain facts to reach a conclusion. When the prosecutor began questioning Prospective Juror No. 4, she asked him two questions ("Would you also be comfortable making those same logical inferences?" and "Want me to do it again?"), to which Prospective Juror No. 4 responded, "Yes."

The prosecutor retold the hypothetical and asked Prospective Juror No. 4 whether the logical conclusion was that there had been a burglary. Prospective Juror No. 4 replied,

"Right." The prosecutor then asked Prospective Juror No. 4 whether he could make the "same types of logical inferences in a courtroom" or whether he was an "I-have-to-see-it-to-believe-it kind of guy?" Prospective Juror No. 4 responded by giving the example of the burglary of his truck. Upon hearing this example, the prosecutor did not give any indication the prospective juror's response strayed, tangentially or otherwise, from the topic they were discussing, nor did the prosecutor steer the juror back to her hypothetical. Instead, because Prospective Juror No. 4's example so aptly illustrated the concept of circumstantial evidence, the prosecutor immediately seized on the example to further highlight how jurors used the concept of circumstantial evidence "every day" in their personal lives, as she had previously discussed with the jury. The prosecutor asked Prospective Juror No. 4: "You didn't see it, right?" "But you know it's missing?" "And you haven't found it yet, right?" Prospective Juror No. 4 answered each question directly, and in response to the prosecutor's final question, whether he needed to see an event to believe it had occurred, Prospective Juror No. 4 replied, "No, I don't have to see it to believe it. I know it's gone."

Prospective Juror No. 4's responses were not only not "tangential," they were so directly on point that the prosecutor used Prospective Juror No. 4's example of a vehicle break-in to question other prospective jurors about the concept of circumstantial evidence. For example, when questioning Prospective Juror No. 15, the prosecutor referred to an experience that the prospective juror had shared about an incident when someone had broken into his car, and the prosecutor used the incident as an example to illustrate the concept of circumstantial evidence: "Again, using the circumstantial evidence, because you

obviously didn't see someone break into your car, but you know the facts are that you left your car, you left the doors unlocked, and when you came back outside, things were missing. So you could reasonably infer, using circumstantial evidence, that someone that didn't have permission to go into your car went into your car?" The prosecutor continued using the same example in questioning another prospective juror, [Prospective] Juror No. 18: "Sir, the same common-sense logic, that circumstantial evidence that [Prospective] Juror No. 15 used to deduce that his car had been, someone took something out of his car, could you do that in a courtroom? Or are you like, 'You know what? He seems like a nice guy, but I actually have to see it to believe it. I have to see someone break in. . . .'"

Prospective Juror No. 4's responses left no doubt he could make logical inferences to draw a conclusion about an event he did not witness. Indeed, he not only stated he understood and could use circumstantial evidence to reach a conclusion, he demonstrated his facility with the concept by coming up with an excellent example. Thus, the prosecutor's explanation for exercising her peremptory challenge, that Prospective Juror No. 4 "wasn't clearly answering [her] question" about whether he could use circumstantial evidence, was unsupported by, and indeed directly contrary to, the record of her questioning of the prospective juror. Faced with a reason that contradicted the record, the trial court had an obligation to question the prosecutor about her explanation and make a specific credibility finding. (See *People v. Hardy*, *supra*, 5 Cal.5th at p. 76 [""when the prosecutor's stated reasons are either unsupported by the record, inherently implausible, or both, more is required of the trial court than a global finding that the reasons appear

sufficient"""]; *People v. Silva*, *supra*, 25 Cal.4th at p. 385 ["[a]lthough an isolated mistake or misstatement that the trial court recognizes as such is generally insufficient to demonstrate discriminatory intent [citation], it is another matter altogether when . . . the record of voir dire provides no support for the prosecutor's stated reasons for exercising a peremptory challenge and the trial court has failed to probe the issue"]; accord *People v. Arellano* (2016) 245 Cal.App.4th 1139, 1167.) The trial court, however, did neither.[4]

Nor did the trial court question the prosecutor or assess her credibility regarding her passing reference to Prospective Juror No. 4's statements during the first day of jury selection. The trial court did not ask the prosecutor about this comment, even though it lacked the requisite specificity. (See *Gutierrez*, *supra*, 2 Cal.5th

---

[4] The People do not point to the failure of counsel for Dixon and counsel for Earl, in response to the court's question whether they had "any final comments," to respond specifically to the prosecutor's reasons for challenging Prospective Juror No. 4 (although counsel for Dixon did respond in general to the prosecutor's stated explanations). Although the Supreme Court in *People v. Hardy*, *supra*, 5 Cal.5th 56 noted the failure of defense counsel to point out a mistake by the prosecutor was "significant," the discrepancy in that case was minor (the prosecutor misstated a word), and the record supported the prosecutor's other reasons for challenging the juror. (*Id.* at pp. 80-83.) Here, the only reason the prosecutor gave for challenging Prospective Juror No. 4 was a mischaracterization of the prospective juror's answers. At that point, the trial court should have inquired further because "the ultimate responsibility of safeguarding the integrity of jury selection and our justice system rests with courts." (*Gutierrez*, *supra*, 2 Cal.5th at p. 1175.)

at p. 1158 ["[t]o meet the second step's requirement [in a *Batson*/*Wheeler* motion], the opponent of the motion must provide 'a "clear and reasonably specific" explanation of his "legitimate reasons" for exercising the challenges'"]; *People v. Long* (2010) 189 Cal.App.4th 826, 847 [trial court should have inquired further where the record was "devoid of any mention . . . of what was disturbing or unseemly about [the prospective juror's] body language or his way of expressing himself"]; *People v. Allen*, *supra*, 115 Cal.App.4th at pp. 551, 553 [the trial court "did not satisfy its *Batson*/*Wheeler* obligations" where the prosecutor stated he challenged a prospective juror because of her "response to [the court's] answers" and "her demeanor," which "were simply 'too general' and 'too vague' for the court to possibly evaluate"].) Moreover, Prospective Juror No. 4 answered more than 40 individual questions from the court and counsel for Dixon on the first day of jury selection. The record shows that Prospective Juror No. 4 answered each question asked of him and that he gave direct answers, even when the questions were compound or less than clear. Indeed, the trial court stated, "Perfect," after Prospective Juror No. 4 answered one of the court's questions, and "Great point" after another one of Prospective Juror No. 4's answers.

Thus, because the trial court did not conduct a "sincere and reasoned effort" to assess the prosecutor's credibility, the court's blanket acceptance of the prosecutor's justification is not entitled to deference. (See *People v. Hardy*, *supra*, 5 Cal.5th at p. 76 [we give deference to the trial court's ruling "'only when the trial court has made a sincere and reasoned attempt to evaluate each stated reason as applied to each challenged juror'"]; *People v. Gutierrez*, *supra*, 2 Cal.5th at p. 1159 ["[a] trial court's

conclusions are entitled to deference only when the court made a 'sincere and reasoned effort to evaluate the nondiscriminatory justifications offered'"]; *People v. Long*, *supra*, 189 Cal.App.4th at p. 845 ["[d]oubt may undermine deference . . . when the trial judge makes a general, global finding that the prosecutor's stated reasons were all 'legitimate,' and at least one of those reasons is demonstrably false within the limitations of the appellate record"].) Because the record contradicted the prosecutor's sole reason for exercising a peremptory challenge against Prospective Juror No. 4, the trial court's conclusion that Dixon and Earl had not met their burden of proving intentional discrimination was "unreasonable" and "unsupported." (*Gutierrez*, at p. 1172; see *People v. Silva*, *supra*, 25 Cal.4th at p. 386 ["[b]ecause the trial court's ultimate finding is unsupported . . . [the] defendant was denied the right to a fair . . . trial"].) Therefore, judgment must be reversed and the case remanded for a new trial. (See *Gutierrez*, at p. 1172; *People v. Cisneros* (2015) 234 Cal.App.4th 111, 120; *People v. Arellano*, *supra*, 245 Cal.App.4th at p. 1169.)[5]

---

[5] Because the trial court erred in denying Dixon and Earl's *Batson*/*Wheeler* motion with respect to Prospective Juror No. 4, we do not reach whether the trial court erred in denying the second *Batson*/*Wheeler* motion. (See *Gutierrez*, *supra*, 2 Cal.5th at p. 1172.)

B. *Substantial Evidence Supported the Attempted Murder Convictions*

Dixon and Earl contend substantial evidence did not support their convictions for the attempted murders of Ricks and Daniels because "neither Ricks nor [Daniels] was visible to the shooters and neither was in the line of fire." There was substantial evidence, however to support both convictions. (See *People v. Morgan* (2007) 42 Cal.4th 593, 613 ["[a]lthough we have concluded that the . . . conviction must be reversed . . . we must nonetheless assess the sufficiency of the evidence to determine whether defendant may again be tried for the . . . offense"]; *People v. Garcia* (2012) 204 Cal.App.4th 542, 553 ["[w]e address defendant's sufficiency of the evidence argument due to its double jeopardy implications"]; *People v. Long*, *supra*, 189 Cal.App.4th at p. 831 [reversing the judgment under *Batson* and *Wheeler* for a new trial because there was "no evidence in the record substantitating one of the [prosecutor's] peremptory challenges" and determining that substantial evidence supported the defendant's conviction for robbery].)[6]

"'To assess the evidence's sufficiency, we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution

---

[6] Earl does not argue substantial evidence did not support his conviction for shooting at an inhabited dwelling.

and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] "Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]" [Citation.] A reversal for insufficient evidence "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support'" the jury's verdict.'" (*People v. Penunuri* (2018) 5 Cal.5th 126, 142.)

"""The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. [Citation.] "'Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant's guilt beyond a reasonable doubt. "'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.'"""" [Citation.] When 'there are two possible grounds for the jury's verdict, one unreasonable and the other reasonable, we will assume, absent a contrary indication in the record, that the jury based its verdict on the reasonable ground.'" (*People v. Ghobrial* (2018) 5 Cal.5th 250, 277-278; accord, *People v. Jones* (2018) 26 Cal.App.5th 420, 442.)

"'Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing.'" (*People v. Sánchez* (2016) 63 Cal.4th 411, 457; see *People v. Perez* (2010) 50 Cal.4th 222, 229; *People v. Smith* (2005) 37 Cal.4th 733, 739.) Thus, the People had to prove Dixon and Earl acted with specific intent to kill Ricks and Daniels. "'"[G]uilt of attempted murder must be judged separately as to each alleged victim.'" [Citation.] '[T]his is true whether the alleged victim was particularly targeted or randomly chosen.'" (*People v. Perez*, at p. 230; see *People v. Stone* (2009) 46 Cal.4th 131, 134 ["'[t]he mental state required for attempted murder is the intent to kill *a* human being, not a particular human being'"].) "Because direct evidence of a defendant's intent rarely exists, intent may be inferred from the circumstances of the crime and the defendant's acts." (*People v. Sánchez*, at p. 457; see *People v. Smith*, at p. 741.)

The evidence showed that Evans and Earl opened fire on the "whole property" and that, when they did so, Ricks and Daniels were still outside, which supported the reasonable inference that Evans and Earl targeted them when they shot at the property. Ricks testified that he heard and saw shots as Dixon's SUV arrived at the house and that when he looked up from his phone he saw the SUV "directly" in front of him and the bandana-covered face of one of the shooters. If Ricks could see the face of one of the shooters, the jury could reasonably infer the shooter could see Ricks. Ricks may have ducked down after hearing additional shots, but it was a reasonable inference from his testimony the shooters had already seen him.

The evidence also showed Daniels was visible to the shooters. Sims testified that he saw Daniels on the porch before Sims left on his bike to go to the store and that he heard the sound of gunfire as he pedaled away from the house. The jury could reasonably infer that only a matter of seconds had elapsed before the shooting began and that Daniels had not moved from the location on the porch where Sims had seen him. Ricks testified he saw Sims "in front of [him] then next thing you know, gunshots." Although Ricks also testified Daniels talked to him for "a couple of seconds" and then went "towards" the back of the car, as opposed to the porch (where Sims placed Daniels), the jury reasonably could credit Sims's account of Daniels's location moments before the shooting. (See *People v. Gomez* (2018) 6 Cal.5th 243, 280 ["'[i]n deciding the sufficiency of the evidence, a reviewing court resolves neither credibility issues nor evidentiary conflicts'"].) And the evidence Evans and Earl fired their weapons at "everything" supported the inference that the shooters intended to kill Ricks and Daniels. (See *People v. Perez*, *supra*, 50 Cal.4th at p. 230 [""[t]he act of firing toward a victim at a close, but not point blank, range 'in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill'""].)

Testimony from the gang expert further supported the inference that Dixon and Earl intended to kill Ricks and Daniels. The gang expert testified the intercepted telephone calls showed Dixon participated in the shooting in retaliation for the murder of his fellow gang members. The gang expert also testified the shooting benefitted the South Side Compton Crips in multiple ways. (See *People v. Smith*, *supra*, 37 Cal.4th at p. 742 ["where motive is shown, such evidence will usually be probative of proof

of intent to kill"]; *People v. Clark* (2016) 63 Cal.4th 522, 626 ["the 'presence of motive is a circumstance that may establish guilt'"].)

As part of their argument the evidence was insufficient to support their convictions for the attempted murder of Daniels, Dixon and Earl contend their respective counsel provided ineffective assistance by failing to object to certain evidence that linked Daniels's injury to the shooting. In particular, they argue their attorneys should have objected to Deputy Garcia's testimony he received instructions from a dispatcher to investigate "another gunshot victim" and to the admission of hospital records detailing Daniels's injury. Dixon and Earl suggest that, had the trial court not admitted this the evidence linking Daniels's gunshot wound to the shooting, there would not have been substantial evidence to support their convictions for the attempted murder of Daniels.

But in determining whether to remand for a new trial, we consider evidence the trial court excluded. (See *People v. Story* (2009) 45 Cal.4th 1282, 1296 ["when reviewing the sufficiency of the evidence for purposes of deciding whether retrial is permissible, the reviewing court must consider *all* of the evidence presented at trial, including evidence that should not have been admitted"]; *People v. Jones*, *supra*, 26 Cal.App.5th at p. 443, fn. 15 [""where the evidence offered by the State and admitted by the trial court—whether erroneously or not—would have been sufficient to sustain a guilty verdict, the Double Jeopardy Clause does not preclude retrial""].) In any event, even without Deputy Garcia's testimony about his investigation at the hospital and Daniel's hospital records, as discussed there was substantial evidence to support their convictions for the attempted murder of Daniels.

DISPOSITION

The judgment is reversed and the case is remanded for a new trial.

SEGAL, J.

We concur:

ZELON, Acting P. J.

FEUER, J.